

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512

ROBERT A. LAURIE ROBERT PERNELL

Commissioner and Presiding Member Commissioner and Associate Member
Energy Facility Siting Committee Energy Facility Siting Committee

INITIAL DRAFT MODIFICATIONS TO SITING REGULATIONS

Section 1 – Section 1212 shall be amended to read:

Section 1212. Rules of Evidence [and Hearing Procedures](#)

The following rules of evidence [and hearing procedures](#) shall apply to any adjudicatory proceeding of the commission and in such other proceedings as the commission may determine by order.

- (a) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant noncumulative evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.
- (b) [Oral or written](#) testimony offered by any party shall be under oath.
- (c) [Each](#) party shall have the right to [call and examin](#) witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matters relevant to the issues in the proceeding, and to rebut evidence against such party.
- (d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions.

[\(e\)](#) _____

The presiding member may establish such additional rules as necessary for the orderly conduct of the proceeding

L&M COMMENT:

This change in the rules appears to create a more efficient process. Although this is a laudable goal the current policy pressure to accelerate proceedings may have significant due process problems in cases with professional representation of the major parties. Additionally the Commission Committees do not take consistent positions on issues and what may be some implied res judicata could create substantial problems. The Committees would actually benefit from being more rather than less inclusive. That is particularly acute where the issues are uncomfortable for

the Commission or are urging the past decisions are incorrect and do not have any precedent in another proceeding as a matter of law.

In certain cases parties “evidence” are incredibly judgmental, as and the work load increase analysis has decreased. The only way to fully elucidate the proffered evidence is solid cross-examination. This of course, does not occur in most of the cases, but in any event the burden should be on the Committee if it prefers to deviate from Administrative Law precepts.

There have been highly contested Committee rulings with substantially legal challenges. These, undoubtedly have put time and emotional pressure on the Committees, however, it would seem that many of these potentially important issues could be given short shrift if the Committee for what ever reason sees no merit.

In addition for all of those representing applicants, this potential impact on due process could be used by particularly zealous future Committees under pressure from various future political forces, that all forms of due process should be vigorously preserved. If an allegation of a violation per se against an Applicant was made these rule changes may give the Committees of the Commission too much process leave way to guarantee due process.

Section 2 – Section 1710 shall be amended to read:

Section 1710 Noticing Procedures; Setting of Hearings, Presentations, Conferences, Meetings, Workshops, and Site Visits.

- (a) All hearings, presentations, conferences, meetings, workshops, and site visits shall be open to the public, except as provided in subsection (h)
- (b) Except for the hearing conducted pursuant to Section 1809(a) and the workshop pursuant to Section 1709.5(d), notice of the initial public hearing on a notice or application shall be mailed or otherwise delivered fourteen (14) days prior to the first such hearing to the applicant, intervenors, and to all persons who have requested notice in writing. Except for continued hearings, notice of each and every subsequent hearing, presentation, conference, meeting, workshop, or site visit shall to the extent possible be mailed at least fourteen (14) days in advance, and in no case less than ten (10) days in advance.
- (c) The public adviser shall be consulted in the scheduling of locations, times, and dates for all hearings, presentations, conferences, meetings, workshops, and site visits so as to encourage maximum public participation.

- (d) Notice of hearings, conferences, and meetings shall be signed by a member of the committee or specific designee thereof.
- (e) The public adviser shall be afforded a reasonable opportunity to review all notices of hearings, presentations, conferences, meetings, workshops, and site visits for timeliness, completeness, clarity, and adequacy of dissemination.
- (f) Hearings, presentations, conferences, meetings, workshops, and site visits may be continued from the date, time, and place originally scheduled to a future date, time, and place, by posting notice at the door in the same manner as provided by Government Code section 11129. If the continuance is to a date ten days or more in the future, then notice shall also be provided by mail as provided in subdivision (b).
- (g) Hearings, presentations, conferences, meetings, workshops, and site visits may be canceled for good reason, provided the following requirements are met:
 - (1) A notice of cancellation shall be posted at the door in the same manner as provided by Government Code section 11129.
 - (2) A notice of cancellation shall be mailed as provided in subdivision (b).
 - (3) If the notice of cancellation is mailed less than ten (10) days before the originally noticed date, then the staff shall work with the public adviser to ensure that notice is provided to all interested parties by the best means available.
- (h) Nothing in this section shall prohibit ~~an applicant from informally exchanging information or discussing procedural issues with the staff~~ any party from meeting with any other party for the purpose of discussing any matter related to the project without a publicly noticed workshop, provided that when a party meets with staff to conduct such discussions, staff shall **notify all parties and provide an opportunity to participate in the discussion**, make a written record of the content of the discussions and shall place that writing in the docket and serve it on all parties to the proceeding.

L&M COMMENT:

In order to insure due process and the authenticity of the process a standard policy of access to all parties to staff discussions with Applicants.

Section 3 – Section 1712 shall be amended to read:

Section 1712 Right to Become a party; rights and Duties.

- (a) Any person may petition to intervene pursuant to Section 1207 of these regulations. Any person whose petition is granted by the presiding member shall have all the rights and duties of a party under these regulations. No person who becomes a party shall be permitted to reopen matters or reopen discovery dealt with in the proceeding prior to the time when such person became a party, without a showing of good cause.
- (b) Each [intervening](#) party shall have the right to present witnesses, to submit testimony and other evidence, to cross-examine other witnesses, to obtain information pursuant to Section 1716, and to file motions, petitions, objections, briefs, and other documents relevant to the proceeding. Each party shall be provided with a copy of the notice or application.
- (c) (c) Each party shall have the responsibility to comply with the requirements for filing and service of documents, the presentation of witnesses and evidence, and any other reasonable conditions which may be imposed by order of the presiding member.

L&M COMMENT:

This change is unnecessary see above.

Section 4 – Section 1714.5 shall be amended to read:

Section 1714.5 Agency Comments on an Application; Purpose and Scope

- (a) Update as necessary the information requested or submitted by the agency during the notice proceedings;
- (b) Perform or conduct such analyses or studies as needed to resolve any significant concerns of the agency, or to satisfy any remaining substantive requirements for the issuance of a final permit by the agency which would have jurisdiction but for the commission's exclusive authority, or for the certification by the commission for the construction, operation, and use of the proposed site and related facilities; and
- (c) Submit to the commission, and upon request of the presiding member, present, explain, and defend in public hearings held on the application, the results of the agency's analyses, studies, or other review relevant to the application. The agency may submit comments and recommendations on any aspect of the application, including among other things, the design of the facility, architectural and aesthetic features of the facility, access to highways, landscaping and grading, public use of lands in the area, and

other aspects of the design, construction, or operation of the proposed site and related facility.

- (d) Comments received by the Commission pursuant to this section from any state agency that make recommendations within the area of expertise of that agency shall be given great deference by the Commission staff in their analysis and shall be deemed to represent the position of the State of California on the subject matter commented upon, except to the extent that staff concludes that such comments are in conflict with other laws of the State of California or of the United States.

L&M COMMENT:

The change represents a real conundrum. The purpose of the CEC enabling legislation was to provide an energy analytical basis for what are in essence electricity reliability and land use decisions. Some times the CEC staff testimony appears to be intrusive in other agencies areas of asserted expertise, However, historically it has served to supplement the testimony of less than competent special agencies on occasion, and to lessen the impact of subject matter or jurisdiction parochialism in others. Just like all participants sometimes it enhances and sometime it distracts depending on ones point of view and representation. The fact that it is mixed speaks well for the staff in the long run. There are currently investigations going on in the lower San Joaquin concerning Air Resources management which were prefaced by the Staff over 20 years ago, and which the staff single handedly corrected. In other cases they took over for incompetent regional officials who were later relieved and even prosecuted in one case. We believe we are better off with a full-unfettered record. The notion of single state representation has been virtually forfeited in the nonsense surrounding who would represent the state at FERC. Additionally many of the so-called expert agencies are not responsive on occasion to staff, the Committees, Applicants or anyone else for that matter.

Section 5 – Section 1741 shall be amended to read:

Section 1741 Application Proceeding; Purpose and Objectives.

- (a) The purpose of an application proceeding is to ensure that any sites and related facilities certified provide a reliable supply of electrical energy at a level consistent with the need for such energy, and in a manner consistent with public health and safety, promotion of the general welfare, and protection of environmental quality.
- (b) The application proceeding shall be conducted in order to accomplish all of the following objectives:

- (1) ~~To ensure that no facility is certified unless it is found to be in conformity with the 12-year forecast of electric demand adopted pursuant to Section 25309(b).~~
- ~~(2)~~ (1) To ensure that the applicant incorporates into the project all measures that can be shown to be feasible, reasonably necessary, and available to substantially lessen or avoid the project's significant adverse environmental effects, and to ensure that any facility which may cause a significant adverse environmental effect is certified only if the benefits of such facility outweigh its unavoidable adverse effects
- ~~(3)~~ (2) To ensure that the applicant takes all measures that can be shown to be feasible, reasonably necessary, and available to comply with applicable governmental laws and standards; to ensure that any facility certified complies with applicable federal law; and to ensure that any facility which fails to comply with an applicable local or state law or standard is certified only if such facility is required for public convenience and necessity and there are not more prudent and feasible means of achieving such convenience and necessity
- ~~(4)~~ (3) To ensure safe and reliable operation of the facility

L&M COMMENT:

The removal of this section requires a replacement by the CEC's obligation to insure that for reliability purposes an appropriate minimum number of sites at appropriate locations are sited. It is the affirmative duty contained in the residual "need" section, provides a basis for certain CEQA findings, and is the bases for the CEQA and local governmental overrides.

Section 6 – Section 1748 shall be amended to read:

Section 1748 Hearings; Purposes; Burden of Proof.

- (a) The hearings shall be used to identify significant adverse impacts of the proposal on the environment, which were not identified in proceedings on the notice of intention and shall assess the feasibility of measures to mitigate the adverse impacts. The applicant's environmental information and staff and agency assessments required by Section 1742 shall be presented.
- (b) The hearings shall consider whether the facilities can be constructed and operated safely and reliably and in compliance with applicable health and safety standards, and shall assess the need for and feasibility of modifications in the design, construction, or operation of the facility or any other condition necessary to assure safe and reliable operation of the

facilities. The applicant's safety and reliability information and staff and agency assessments required by Section 1743 shall be presented.

- (c) The hearings shall consider whether the facilities can be constructed and operated in compliance with other standards, ordinances, regulations and laws and land use plans applicable to the proposed site and related facility. The applicant's proposed compliance measures and the staff and agency assessments required by Section 1744 shall be presented. The determination of compliance required by Section 1744.5 shall also be presented.
- ~~(d) The hearings shall consider whether the proposed facilities are in conformity with the level of electricity demand adopted pursuant to Section 25309(b) of the Public Resources Code. The applicant and staff shall both present evidence in support of their positions on this issue.~~
- ~~(e)~~ (d) Except where otherwise provided by law, the applicant shall have the burden of presenting sufficient substantial evidence to support the findings and conclusions required for certification of the site and related facility.
- ~~(f)~~ (e) The proponent of any additional condition, modification, or other provision relating to the manner in which the proposed facility should be designed, sited, and operated in order to protect environmental quality and ensure public health and safety shall have the burden of making a reasonable showing to support the need for and feasibility of the condition, modification, or provision. The presiding member may direct the applicant and/or staff to examine and present further evidence on the need for and feasibility of such modification or condition.
- ~~(g)~~ (f) Any party to the application proceeding shall be provided a reasonable opportunity to move to strike portions of prior testimony taken during the notice proceeding. Such motion may be based on incorrectness, irrelevance, or changed circumstances.

L&M COMMENT:

Same as previous section.

Section 7 – Section 1751 shall be amended to read:

Section 1751 Presiding Member's proposed Decision; Basis.

- (a) The presiding member's proposed decision shall be based exclusively upon the hearing record, essential elements of proof which of which shall be included in the evidentiary record of the proceedings on the application.

- (b) The presiding member's proposed decision shall contain reasons supporting the decision and reference to the bases for each of the findings and conclusions in the decision.

Section 8 – Section 1752 shall be amended to read:
Section 1752 Presiding Member's proposed Decision; Contents.

See reliability comments above.

~~(a) Whether and the circumstances under which the proposed facilities are in conformity with the 12-year forecast of statewide and service area electric power demands adopted pursuant to Section 25309(b) of the Public Resources Code.~~

~~(b)~~ (a) The extent to which the proposed facilities are in compliance with:

- (1) Public health and safety standards, including any standards adopted by the commission
- (2) Applicable air and water quality standards; and
- (3) Any other applicable local, regional, state, and federal standards, ordinances, regulations or laws.

~~(c)~~ (b) Necessary modifications, mitigation measures, conditions, or other specific provisions relating to the manner in which the proposed facilities are to be designed, sited, and operated in order to:

- (1) Protect environmental quality;
- (2) Assure safe and reliable operation of the facility; and
- (3) Comply with applicable standards, ordinances, regulations or laws.

~~(d)~~ (c) Unless the commission finds that such provisions would result in greater adverse effect on the environment or would be infeasible, specific provisions to meet the objectives of the California Coastal Act, as may be specified in a report submitted by the California Coastal Commission pursuant to Section 30413(d) of the Public Resources Code, or to meet the requirements of Division 19 (commencing with § 29000) of the Public Resources Code or Title 7.2 (commencing with § 66600) of the Government Code as may be specified in the report submitted by the San Francisco Bay Conservation and Development Commission pursuant to subdivision (d) of Section 66645 of the Government Code.

~~(e)~~ (d) With respect to controlling population density in areas surrounding the proposed facilities, proposed findings on each of the following:

- (1) Whether existing governmental land use restrictions are of a type

necessary and sufficient to guarantee the maintenance of population levels and land use development over the lifetime of the facilities which will ensure the public health and safety;

- (2) Whether, in the case of a nuclear generating facility, the area and population density criteria specified by the United State Nuclear Regulatory Commission for assuring public health and safety are sufficiently definitive for valid land use planning requirements; and
 - (3) Whether the commission should require as a condition of certification that the applicant acquire, by grant or contract, the right to prohibit development of privately owned lands in areas surrounding the facilities in order to control population densities and to protect public health and safety.
- ~~(f)~~ (e) With respect to any facility to be located in the coastal zone or any other area with recreational, scenic, or historic value, proposed findings and conditions relating to the area that shall be acquired, established, and maintained by the applicant for public use and access; and with respect to any facility to be located along the coast or shoreline of any major body of water, proposed findings and conditions on the extent to which the proposed facility shall be set back from the shoreline to permit reasonable public use and to protect scenic and aesthetic values.
- ~~(g)~~ (f) With respect to any of the following areas;
- (1) State, regional, county or city parks;
 - (2) Wilderness, scenic, or natural reserves;
 - (3) Areas for wildlife protection, recreation or historic preservation;
 - (4) Natural preservation areas in existence as of January 7, 1975;
 - (5) Estuaries in an essentially natural and undeveloped state; Findings and conclusions on whether the facility will be consistent with the primary land use of the area; whether the facility, after consideration of feasible mitigation measures, will avoid any substantial adverse environmental effects; and whether the approval of the public agency having ownership or control of the land has been obtained.
- ~~(h)~~ (g) With respect to any facility to be sited in a coastal zone location designated by the California Coastal Commission pursuant to Section 30413(b) of the Public Resources Code, or in a location designated by the Bay Conservation and Development Commission pursuant to subdivision (b) of Section 66645 of the Government Code, findings on whether the approval of the public agency having ownership or control of the land has

been obtained, and findings of the California Coastal Commission or the BCDC, respectively, on each of the following:

- (1) Whether the facility will be consistent with the primary land use of the area; and
- (2) Whether the facility, after consideration of feasible mitigation measures, will avoid any substantial adverse environmental effects;

~~(h)~~ (h) Where a nuclear powered facility is proposed, findings on;

- (1) Whether and when the facility will require reprocessing of nuclear fuel rods or off-site storage of such fuel rods in order to provide continuous onsite fuel core reserve storage capacity; and
- (2) Whether and when facilities with adequate capacity to reprocess nuclear fuel rods, if such reprocessing is required, and facilities with adequate capacity to store such fuel, if such storage is approved by an authorized agency of the United States, are or will be in actual operation at the time the nuclear powered facility requires such reprocessing or storage.

~~(i)~~ (i) provisions for restoring the site as necessary to protect the environment, if the commission denies approval of the application.

~~(j)~~ (j) Findings on the extent to which the applicant has complied with the recommended minimum standards of efficiency for operation of the facility, approved pursuant to Section 25402(d) of the Public Resources Code.

~~(k)~~ (k) With respect to any facility which does not comply with an applicable state, local or regional standard, ordinance or law, findings and conclusions on whether the noncompliance can be corrected or eliminated; and if such noncompliance cannot be corrected, findings on both the following:

- (1) Whether the facility is required for public convenience and necessity; and
- (2) Whether there are no more prudent and feasible means of achieving such public convenience and necessity.

~~(l)~~ (l) Any other findings and conclusions relevant to the commission's decision.

Section 9 – Section 1755 shall be amended to read:

Section 1755 Final Decision.

- (a) At the conclusion of the hearings under Section 1754, the commission shall adopt a final written decision in conformity with Public Resources Code Section 25523.
- (b) The decision shall not certify any facility considered in the proceeding unless the commission's findings pursuant to subsections ~~(a)~~, (fe), (gf), and (lk) of Section 1752 are all in the affirmative.
- (c) The commission shall not certify any site and related facilities for which one or more significant adverse environmental effects have been identified unless the commission makes both of the following findings:
 - (1) With respect to matters within the authority of the commission, that changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant environmental effects identified in the proceeding.
 - (2) With respect to matters not within the commission's authority but within the authority of another agency, that changes or alterations required to mitigate such effects have been adopted by such other agency, or can and should be adopted by such other agency.
- (d) If the commission cannot make both the findings required under subsection (c), then it may not certify the project unless it specifically finds both of the following:
 - (1) That specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the application proceeding; and
 - (2) That the benefits of the project outweigh the unavoidable significant adverse environmental effects that may be caused by the construction and operation of the facility

L&M COMMENT:

The strength of the Warren Alquist Act is its ability to control the fate of powerplant deployment in California. As such its fundamental approval and denial protection for all parties is a litigated Warren Alquist Act/ CEQA Equivalent/ State and Local LORS process. The entirety of the record modification has great merit provided that the various comments etc, which make up the totality of the record, are subject to the same rigors, as the affirmative evidence required of the applicants. It may make sense to have comments etc., which may have persuasive merit, formalized by information under oath subject to cross-examination. Although this sounds rococo it merely means that certain commenter are sworn and asked questions. This was quite common in the early days of the Commission when precision outweigh speed to everyone's benefit and detriment. There

is no apparent reason why this could not be accelerated where necessary in the current environment. If 50 outside parties pounced on the Commission with extremely important, but controversial information and three controlled the Commissions budget would their input be subject to cross examination?